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Establishing the Rule of Law through Networking and Leadership

Brian Christopher Darling

Thomas Edison State University

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This paper is dedicated to my son, Jacob Paul William Darling.

Contents

Abstract

As the conflicts of the past decade and a half have progressed, the United States Military has engaged in stabilization operations which have included Rule of Law initiatives. This capstone paper considers Rule of Law initiatives conducted during the "Global War on Terror" and related overseas contingency operations. These initiatives typically fall under the responsibility of the Department of State; however, due to security considerations and funding sources, the Department of Defense, and the Army's Judge Advocate General's Corps in particular, have been tasked with resolving issues of governance and building the faith of the local national populations in their fledgling governments. This is not the most efficient means of improving the Rule of Law in host nations. After demonstrating the ineffectiveness of these initiatives, the author suggests alternative means of establishing the Rule of Law through coordinated, networked leadership. The type of proposed network will include governmental organizations, intergovernmental organizations, nongovernmental organizations, and multinational corporations; this type of networked leadership can take the emphasis off of the United States Military and the place responsibility firmly on the shoulders of the international community.

PREFACE

This capstone, like my previous capstone paper, is the result of years of graduate education and professional military experience. Since publishing the previous paper, I have deployed to Qatar with the New Jersey Army National Guard, served an overseas duty for training tour in Germany, and completed the requisite professional military education to advance to the next military grade, the Advanced Leaders Course held at The Judge Advocate General's Legal Center and School in Charlottesville, Virginia. I also completed the Theater Security Decision Making course through the United States Naval War College. I began the Masters in Public Service Leadership Program while deployed to Qatar, and immediately began thinking about writing on the topic of rule of law.

In the previous paper, I wrote extensively on the topic of counterinsurgency; part of that paper dealt with the type of leader that could be expected to be a successful counterinsurgent. In this paper, I revisit the topic to some extent; one aspect of counterinsurgency is establishing the rule of law. A counterinsurgent must be able to lead as a part of a network in order to facilitate and support the legitimacy of the host nation government.

Again, it has been my distinct privilege to work with my fellow students at Thomas Edison State University.

Establishing the Rule of Law Through Networking and Leadership

During the course of ongoing overseas contingency operations, formerly referred to as

the "Global War on Terror," the United States armed forces have conducted both combat and

stabilization operations. Where major combat operations were concluded rather quickly,

stabilization operations have been ongoing since the period immediately following the attacks of

September 11th, 2001, and the initial invasions of Iraq and Afghanistan. The focus of a major

portion of military operations in the Central Command Theater, or the area commonly referred to

as the Middle East, has been counterinsurgency and counterterror operations. The goal of these

operations has been to establish the legitimacy of the fledgling host nation governments. One

facet of counterinsurgency operations is establishing the Rule of Law. Rule of law initiatives are

highlighted in a number of key national security documents, to include the National Security

Strategy and the Quadrennial Defense Review; the 2010 National Security Strategy mentioned

America's commitment to the rule of law at home and abroad fourteen times. Military judge

advocates and their staffs have been concerned with and engaged in the establishment of the

Rule of Law since the inception of the current contingency operations; a major tool available to

these legal professionals has been the Commander's Emergency Response Program, which

provides funding for projects aimed at improving the infrastructure of the host nation

governments. However, a number of factors prevent Rule of Law programs from being

effective; projects funded through the Commander's Emergency Response Program tend to be

focused on eliminating the symptoms of problems, rather than the corruption inherent in the host

nation governments. The purpose of this capstone paper is to examine the Rule of Law program

as it has been conducted since the beginning of the Global War on Terror; specifically, this paper

will seek to explicate the flaws of the program. It will then offer possible solutions available

through networked leadership between the United States Government and various other organizations, ranging from intergovernmental organizations, through nongovernmental organizations, to private companies and contractors. Such networked leadership, based on successful examples of community and economic development, would remove the financial burden from the American taxpayer and allow the United States to lead a coalition, rather than operating inefficiently and unilaterally. The Rule of Law program will be examined as part of the counterinsurgency strategy and will take into consideration the national security strategy and related documents as well as foundational works of counterinsurgency theory, such as David Galula's *Counterinsurgency: Theory and Practice*. Networked leadership will be examined using several works as lenses; for example, this paper will take into consideration recommendations made by Keast and Agranoff in their text *Network Theory in the Public Sector: Building New Theoretical Frameworks* and by Goldsmith and Eggers in their book *Governing by Network: The New Shape of the Public Sector*.

Literature Review

The relevant literature pertaining to this capstone project can be divided into two separate sections: the first section consists of those military publications which govern the authorities and funding sources of rule of law projects; the second section provides theoretical guidance for networking similar community development projects. Prior to discussion of either military rule of law projects or networked leadership, the standards of the evaluation of the program must be discussed; the framework for this capstone project is greatly influenced by *Program Evaluation: Methods and Case Studies* by Emil J. Posavac. Through examples, explication, and anecdotes, the author outlines the steps of a successful program evaluation. Section by section, Posavac describes the steps involved in performing a successful program evaluation and in producing a

concise report of the findings and recommendations. The text culminates in the presentation of a

brief, but complete, program evaluation. This text is particularly relevant to this capstone

project; where the Rule of Law handbook and the ancillary texts from The Judge Advocate

General's Legal Center and School provide the metrics for a successful Rule of Law program,

Posavac's text provides the framework for the presentation of the findings and recommendations.

The author discusses the process by which a needs assessment is conducted, discusses the ethics

of program evaluation, and defines qualitative evaluation. Posavac's discussion of needs

assessments corresponds to theoretical definitions of need discussed by Ruth Lister in her book,

Understanding Theories and Concepts in Social Policy. Lister discusses the idea of a needs

assessment prior to conducting a social reform initiative.

> An understanding of needs is critical in assessing the effectiveness of welfare
> policies and proposed reforms to them and also in the formulation of alternatives.
> In other words a key question to be asked is: how well does or will any specific
> social policy meet the needs of those to whom it is directed? (Lister, 2010, p.
> 182)

Further, the author defines the concept of a need in the context of a social program; these

programs are

> …rooted in the idea that a need implies that, unless it is met, a person will be
> harmed in some way: 'that there is a certain state of human flourishing or welfare,
> and if a person fails to achieve this state he will ail or be harmed. Needs are what
> is necessary to achieve this condition of flourishing'. (Lister, 2010, p. 185)

This definition corresponds to that provided by Posavac in his text.

Of particular note, Posavac discusses interview techniques when obtaining qualitative

information for an evaluation (2015, p. 153); this is particularly relevant to this capstone project,

as local attorneys, judges, and key leaders were interviewed regarding their opinion of the value

of the Rule of Law initiatives. The author also considers the cost of a qualitative program

evaluation (Posavac, 2015, p. 162); as this paper will demonstrate below, Posavac's cost

considerations were not practical for the type of program evaluation conducted by the Rule of

Law program. Posavac's sources are professional and well-documented, and the text provides

the framework for the production of a successful program evaluation. Using Posavac's work as a

frame and the Rule of Law literature as a lens, the composition of a capstone project such as this

is greatly simplified.

As the wars in Iraq and Afghanistan have led to the rule of law projects discussed in this

capstone paper – community development projects funded through the Commander's Emergency

Response Program and other sources provided by the United States Government – and as these

conflicts are irregular in nature, a discussion of counterinsurgency operations is essential. In

conducting irregular warfare, the goal of the United States is to establish and facilitate the

maintenance of the legitimacy of the host nation government. Prior to any discussion of national

security policy and strategy, understanding of the fundamentals irregular warfare is mandatory.

These fundamentals were first discussed by Lieutenant Colonel David Galula in his book

Counterinsurgency Warfare: Theory and Practice. In writing his book, Galula sought to create a

set of guidelines for understanding insurgency and for conducting counterinsurgency operations.

In the introduction to the book, the author set out the questions he sought to answer; he also

illustrates how complicated and frustrating the conduct of irregular warfare can be. Galula draws

on the previous work of Carl Von Clausewitz and Mao regarding theory; the author recognized

the political nature of warfare, and the political conflict inherent in counterinsurgency operations.

> The objective being the population itself, the operations designed to win it over
> (for the insurgent) or to keep it at least submissive (for the counterinsurgent) are
> essentially of a political nature. In this case, consequently, political action
> remains foremost throughout the war. It is not enough for the government to set
> political goals, to determine how much military force is applicable, to enter into
> alliances or to break them; *politics becomes an active instrument of operations*
> (Galula, 2006, p. 5).

Legitimacy is determined by the populace; Galula is aware of the importance of establishing the legitimacy of the host nation government as the provider of services, security, and ultimately, rule of law; "If the insurgent manages to dissociate the population from the counterinsurgent, to control it physically, to get its active support, he will win the war because, in the final analysis, the exercise of political power depends on the tacit or explicit agreement of the population" (Galula, 2006, p. 4). The author writes from his own experience in counterinsurgency operations; his book anticipated the escalation of hostilities in Vietnam. Unfortunately, Galula himself died before the United States fully committed troops to that conflict.

The text that serves as the lynchpin for the argument presented in this paper is *The Well-Connected Community: A Networking Approach to Community Development* by Alison Gilchrist; this book is the glue that holds this entire capstone together. Gilchrist argues that networks are essential to the implementation of community development programs, to include those pertaining to governance and social justice. It is necessary for the reader to find the argument that the successful implementation of a rule of law program is dependent upon the establishment of a network of agencies, international organizations, nongovernmental organizations, and other entities plausible. It is also necessary for the reader to understand how these networks are established and applied to community and economic development initiatives. Finally, it is necessary for the reader to understand that rule of law initiatives are a form of international community and economic development program. It is not difficult to adopt these arguments as sound, as both Jones and Kleinfeld illustrate the fact that the rule of law is necessary in order for a country to develop economically.

Gilchrist's text makes these arguments even more plausible. She discusses the global implications of the community and economic development movement, and illustrates the benefits

– and problems – associated with leading an initiative via network. Gilchrist illustrates the

interest that intergovernmental and nongovernmental organizations have in community and

economic development, alluding to the arguments by Jones and Kleinfeld that are presented

below; for example, "The World Bank has been especially keen to invest in community

empowerment and adult education programmes that build social capital in the developing world

for combating poverty and supporting regeneration" (The Well-Connected Community: A

Networking Approach to Community Development, 2009, p. 10). Such nongovernmental

organizations are an essential part of the network, "Nongovernmental organizations (NGOs) play

a key role in development assistance from working with multilateral agencies such as the World

Bank and bilateral agencies such as USAID" (Green & Haines, p. 127). Further, several other

nongovernmental organizations are listed as invaluable resources for community and economic

development and for advancing the rule of law abroad; for example, "National and international

nongovernmental organizations (NGOs) such as the United Nations, the World Bank, and the

Organization for Economic Cooperation and Development (OECD)" are concerned with

establishing the rule of law and further facilitating regeneration (Phillips & Pittman, 2014, p.

355). A rule of law initiative is such a program supporting regeneration; rebuilding the justice

sector after conflict is essential to establishing the legitimacy of the host nation government,

thereby creating the stability necessary for the economy to flourish. Gilchrist also references

another tendency of these intergovernmental and nongovernmental organizations to influence the

governance of these nations; "Most international programmes for poverty eradication, for

example sponsored by the World Bank or United Nations agencies, require forms of community

participation as a means of building social capital, as well as ensuring some kind of contribution

from the beneficiaries" (p. 10). This is an extremely polite way of stating that these

organizations require governance reform, which will be discussed in terms of capture below.

The concept of social capital to which Gilchrist refers is "a collective resource embedded in and

released from informal networks" (p. 9). This resource is rooted in the "shared norms of trust

and mutuality that bestow advantage on individuals and communities" (p. 9). Social capital is

gauged by three different metrics: "levels of trust between people and social institutions;

participation in social and civil activities, and networks of personal contacts" (p. 9). The first

two metrics can apply directly to rule of law initiatives: How much trust do the citizens have in

the judicial system? Are they likely to participate in the legitimate judicial sector, or are they

more likely to participate in the sharia courts established by the insurgency?

Regarding governance initiatives, whether international or local, Gilchrist observes that

there is a trend toward involvement in the network by a greater number of entities; "More

participative forms of 'governance' are being created that rely on multi-agency partnerships in

which communities are strongly represented as stakeholders and local 'experts'" (p. 20). This is

particularly evident in rule of law initiatives in Afghanistan, where partnerships between

intergovernmental networks interact regularly with individuals from different ethnic

backgrounds.

Gilchrist illustrates the importance of trust and accountability in and between nodes of

the network. The question of trust can be an issue if members of a network are too closely

associated with the agencies they are trying to improve.

> many of the arrangements which support co-operation within the community and
> voluntary sector become disadvantageous when these positive links and
> affiliations prevent organizations from dealing with difficult situations, such as
> fraud, incompetence or discrimination. (Glichrist, 2009).

Accountability can be an issue in any network, regardless of its goals; "accountability issues

arise whenever people are engaged in joint endeavours and permitted to act with discretion

within a broad framework of agreed aims" (p. 59). The author warns against the appearance of

impropriety that may result from a lack of accountability within a network; "Without strong

community networks holding leaders to account and providing them with support, there is a high

risk of power tarnishing individual motives and integrity" (p. 59). Within the network, this can

lead to friction between nodes; at the macro level, the appearance of impropriety can damage the

efforts of the network and therefore call into question the legitimacy of the very government the

rule of law initiative is seeking to legitimize. Therefore, the network and its nodes must be

accountable for its activities; "like any other occupation, community development workers need

to maintain their accountability vis-a-vis colleagues, employers, and community members" (p.

141). With respect to the topic of this capstone, the individual agencies engaged in rule of law

initiatives must be accountable to each other, to the United States government, and perhaps most

importantly, to the people of Afghanistan. Practitioners should refrain from attempting to

overlay western style justice systems onto the populace; further, they should avoid engaging in

superficial projects like procurement and construction and concern themselves with building

trust and confidence in the legitimate government and its justice sector.

　　　The first text consulted when initiating a rule of law program is *The Rule of Law*

Handbook published by The Judge Advocate General's Legal Center and School. The purpose

of the *Rule of Law Handbook* is to provide practicing judge advocates (military attorneys) with a

"toolbox" for engaging in projects that facilitate the establishment of legitimacy of host-nation

governments. The authors of the *Rule of Law Handbook* have compiled a text that includes the

source documents for the establishment of the rule of law, assessments of various legal systems

and the social context of the rule of law within them, lists of potential key leaders and intra and

intergovernmental agencies, and a guidebook for planning. The handbook also contains

suggestions for funding sources and for interaction with host-nation key leaders and personnel.

There is discussion of recent efforts to establish the rule of law in Afghanistan, and the editors

included vignettes from practitioners. The appendices include a short history of the involvement

of judge advocates in stabilization activities, sources for training pertaining to rule of law, and

further suggestions for interagency partnerships. Most importantly, one of the appendices

contains guidance and metrics for assessing rule of law programs. The handbook offers a wealth

of source material. The editors draw from the National Security Strategy and related documents,

work produced by the Congressional Research Service assessing the rule of law program,

presidential policy directives, national and international law, and the testimony of serving judge

advocates. As a starting point, the *Rule of Law Handbook* is excellent. A brief perusal of some

of the chapters and subsections can direct the reader to sources of funding and the appropriate

point of contact for obtaining it. However, it is important to note that the handbook is *only* a

starting off point. Long-time practitioners of stability operations tend to forego using it, turning

instead to the after action reviews published in the *Forged in the Fire* text and its supplement.

In order to avoid the errors of previous practitioners, a judge advocate should also consult

Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2008. Forged in

the Fire is a collection of After Action Reports compiled by the Center for Law and Military

Operations at The Judge Advocate General's Legal Center and School. The purpose of these

reports is to determine what was supposed to happen, what actually happened, and how

performance could be improved in the future. The officers who compile the After Action

Reports in *Forged in the Fire* divide the reports first by discipline and then by unit. As such, a

practitioner may hone in on a specific military legal discipline and find what worked during

previous deployments and what did not. The section pertaining to rule of law is broken into

sections related to doctrine, interagency coordination, planning, and relevance. The importance

of networking is stressed in the section pertaining to building local relationships; further,

program evaluation is discussed in a section on assessment of justice sector institutions. The

Commander's Emergency Response Program is explicated under civil and fiscal law; the

program allows certain funds to be applied to support humanitarian operations, under the

umbrella of which rule of law projects fall. Direct reference is made to the *Rule of Law*

Handbook and to David Galula's *Counterinsurgency: Theory and Practice*. *Forged in the Fire*

illustrates how projects have been funded and implemented during previous deployments, and

cites relevant national security documents in order to justify the projects and expenditures.

Unfortunately, much of the source material, and the book itself, is dated; the text was originally

published at the end of the "surge" in Iraq and before the beginning of the "surge" in

Afghanistan. A supplement, which will be further discussed below, has since been published;

the supplementary text delves deeper into the subject matter.

Another essential text is the *Operational Law Handbook.* The *Handbook* serves as a

tertiary source to direct the practitioner to appropriate legal sources and sources of funding. It is

meant to expedite the Military Decision Making Process. The *Operational Law Handbook* is

published annually by CLAMO, and is divided by discipline, providing summary guidance

contained in Department of Defense Directives and Instructions and Department of the Army

Regulations and Pamphlets. As it is published annually, the handbook is more up to date than

the *Forged in the Fire* text or its supplement; it is also a more formal source than the *Rule of Law*

Handbook. Further, each chapter begins with a list of references which may be consulted when

deciding where funding should originate or which agency should be coordinated with. Though

the handbook is published by an Army entity, it is essentially joint, and references joint doctrine.

Under the subsection pertaining to fiscal law, there is some discussion of Operations and

Maintenance funds; these funds are used to pay local national attorneys to assist with the

assessment and implementation of rule of law projects funded through the Commander's

Emergency Response Program.

The Commander's Emergency Response Program is one of several sources of money

used to fund rule of law initiatives. The Operational Law Handbook defines the CERP program

in the Fiscal Law chapter.

> CERP is a statutory authorization to obligate funds from the DoD O&M
> appropriation for the primary purpose of authorizing U.S. military commanders
> "to carry out small-scale projects designed to meet urgent humanitarian relief
> requirements or urgent reconstruction requirements within their areas of
> responsibility. (Operational Law Handbook, 2015, p. 249)

These reconstruction requirements can be applied to the justice sector, as long as the efforts

establish "immediate and direct benefit to the people of Afghanistan" (p. 249). During the

course of the 2010 deployment of the 86th IBCT, this was interpreted loosely, as CERP was used

to fund courthouse construction, legal libraries, locking bookshelves, and media campaigns.

The use of Afghan Attorney Advisors to pay tort claims is discussed below. These types

of claims may be paid from CERP funds under certain circumstances not covered by the Foreign

Claims Act; "CERP appropriated funds may be used for condolence payments to individual

civilians for death or physical injury" resulting from military operations (p. 250). As stated

below, these types of payments, which can be disbursed quickly, provide local nationals with an

avenue for the redress of grievances and help to establish the legitimacy of the host nation

government.

The authorities governing rule of law projects are also discussed in the handbook. The

Handbook cites statutory authorities, National Defense Directives and parent documents, Joint

Doctrine, Department of Defense Directives and Instructions, and Army Regulations and Pamphlets. As with the *Rule of Law Handbook*, The *Operational Law Handbook* is a secondary source at best; it directs practitioners to the appropriate laws and regulations on which to build a strong Rule of Law program, but is not strong enough to cite as a primary source.

The first of the texts addressing the issue of how the rule of law program should have been run is *Governing by Network: The New Shape of the Public Sector*. Goldsmith and Eggers argue that the public is better served by a small government which accomplishes its mission through interagency networking than by a large, hierarchical government. They also argue that tomorrow's leaders must be prepared to adopt a networked approach to leadership as opposed to the traditional hierarchical model. Goldsmith and Eggers analyze a number of Federal and State government entities in order to examine the flaws inherent in various leadership styles. They propose that the public is often better suited by the employment of contractors than by the filling of positions by public employees. The text is divided into two major parts; one outlines the history of the networked model of government and the advantages and disadvantages inherent in a networked leadership style, the other discusses the process of managing a network. Goldsmith and Eggers address the issue of accountability when utilizing a networked leadership model. They stress the importance of building relationships between the members of the network. In the final chapter, the authors address focus; the network should be focused on value to the public, not on the number of active programs. They also address the question of funding in terms that are congruent with the discussion of "Money as a Weapons System"; money is a tool, but not the tool, that ensures success. The authors' theories align with those outlined in this paper; in the section of the public sector addressed herein, there is wasteful spending and focus on projects instead of quality of service provided. Goldsmith and Eggers would concur that the rule of law

program could have allocated funds more efficiently and focused on the overall quality of one

project, as opposed to putting together a number of projects which were quickly and poorly

executed. They would also likely argue for the inclusion of corporate entities in the network, and

for the use of contract personnel to provide security as opposed to military or federal employees,

as this would provide a cost benefit to the government and to the network.

The second applicable text is *Network Theory in the Public Sector: Building New

Theoretical Frameworks*. While differentiating between the types of networks that have been

successful in the private sector and those that are operating in the public sector, the authors

analyze the successful implementation of networked leadership in the public sector. Keast,

Mandell, and Agranoff stress the importance of creating networks that serve towards mission

accomplishment, rather than networks that form based on close proximity of members. The

authors also stress the importance of trust building and mutual accomplishment of goals for

members of a network. Mandell writes early in the text on how networks, in the professional

sense, "are goal-directed and multi-sectoral as opposed to serendipitous contacts among actors;

that is, they are conspicuously arranged and bounded groupings, as opposed to associative

clusters" (Keast, Mandell, & Agranoff, 2013, p. 3). Mandell makes a point of differentiating

between those networks established in the private- and business-sectors and those that function

in the public sector; "the legally based authoritative roles of the public sector and the growing

phenomenon of externilization of direct government services distinguish these types of networks

from those discussed in the business literature" (Keast, Mandell, & Agranoff, 2013, p. 4). The

author discusses the horizontal nature of the network, as opposed to the vertical structure of a

typical bureaucracy; "With their focus on trust, reciprocity, and mutual gains, networks require a

shift from conventional hierarchical authority to processes and operational arrangements that are

more horizontal, equalitarian, and relational in their orientation" (p. 6). In keeping with the

thesis of this paper, Mandell discusses network complexity, and the relationship between

networks and outcomes; "there are also networks that are based on then notion of network

governance in which bonds of interpersonal relationship, trust, mutuality, and reciprocity are the

defining 'collaborative outcome'" (p. 8). Such networks can not only transform processes, but

can transform governance itself; these networks "are therefor moving beyond interorganizational

arrangements to more transformative networks in which new systems are created" (p. 8).

The importance of trust is addressed in the chapter pertaining to collaborative advantage;

this is a practice-based theory about the management of collaborations, which focuses on the

potential for collaborative advantage arising out of organizational partnerships" (p. 51).

Successful collaborations result in collaborative advantage, "the synergy that can be created

through joint working" (p. 52). Unsuccessful networks can result in collaborative intertia, "the

tendency for collaborative activities to be frustratingly slow to produce output or uncomfortably

conflict ridden" (p. 52). Contributing authors Siv Vangen and Chris Huxham address the

question of dominant voices within a network; "Imbalance in power and the inevitability that

some partners will be more central to the enactment of the collaborative agenda than are others

tend to dictate behaviors that get in the way of trust building" (p. 58). Of particular note, these

contributors point out an issue that will be discussed below: dischord between nodes. Vangen

and Huxham develop the idea that cultural frictions can detract from network productivity;

"cultural frictions arise because individuals come to the collaboration with different expectations

of what can be achieved within an organizational or collaborative context, with different ways of

communicating and different ettiquettes and norms" (p. 60). Whereas the individual departments

and agencies of the United States government and the allies of the United States might have the

stated goal of advancing the rule of law in Afghanistan, the Departments have different customs and courtesies, different protocols, and different ways of accomplishing their stated goals; this is complicated further when one involves international partners. The authors also stress flexibility in the performance of network tasks; whereas each node on the network can be a contributor to the final goal, the nodes are not designed with the accomplishment of the network goal as their primary function; "joint pursuit, however, usually requires some flexibility because partners' resources are oriented toward internal purposes rather than the goals of the collaborartion and so is not designed to accommodate partners" (p. 60). This line of thinking is supported and further developed by Gilchrist; "community development workers need the flexibility and confidence to respond opportunistically to events occurring outside of their intentions or control" (The Well-Connected Community: A Networking Approach to Community Development, p. 122).

A later chapter by Christopher Koliba pertaining to Governance Network Performance addresses the assessment of network perfomance; in order to assess networks "within a public administration and policy context, we must regard them as tangible, observable structures composed of nodes (or agents) and ties that formally or informally, tightly or loosely, couple two or more nodes together" (p. 84). The author discusses the properties of networks as "givens"; networks govern, or "exist to carry out some facet or facets of the policy process and policy stream" (p. 85). They exist within almost all of the areas which generate policy, and they have multiple nodes and levels of involvement; "These domain-specific networks are comprised of agents spanning sectors, geographic scales, and social scale. These networks involve not only governments, but also for profit and nonprofit organizations as well" (p. 85). Networks may have nodes that simultaneously supervise and collaborate with other nodes, and they may be as complicated as the proverbial Gordian Knot; "The multisector, multiscalar composition of

network agents combines with the mixed administrative ties to present a decidedly complex

picture of nework structure and function and network management" (p. 86). Networks are

directed, "They are steered by the decision making of individual network managers, guided by

laws, rules, and regulations enforced by institutions and shaped by the policy tools designed and

implemented to address public interest and provide public value"; further, the performance of the

networks can be monitored and assessed (p. 87).

>Performance metrics are used in resource allocation, strategic planning, and
>tactical decision making. They are used to make a system or network responsive
>to the goals, desires, and ascriptions of certain agents – be they funders, regulators
>or collaborators. (p. 87).

This type of direction may seem unfamiliar to those who are involved in this type of work;

Gilchrist writes that there has previously been an aversion to established metrics: "For years

community development has argued against predetermined targets and performance criteria,

asserting that intervention strategies must be non-directive and nurture organic development

rather than deliver an external agenda" (The Well-Connected Community: A Networking

Approach to Community Development, p. 123).

Jones and his co-authors begin by posing two questions; first, they seek to evaluate how

successful the United States and its coalition partners have been in reestablishing the rule of law

after conflict, and second, they seek the most important lessons for ongoing contingency

operations and for future operations on the hybrid battlefield.

The authors immediately make reference to the "golden hour" – in medicine, this refers

to the hour after trauma when intervention is most likely to save a life; here, they are referring to

the immediate period after the conclusion of combat operations. During this period, the citizenry

may support the intervening coalition and accept newly organized democratic governments as

legitimate; further, during this period, insurgent elements and other parties will not yet have had

time to coalesce or regroup. Jones and his co-authors also highlight the importance of the justice sector. They also establish some guidelines pertaining to reestablishing the rule of law after the war on the battlefield has been won, but the hearts and minds of the citizenry have not.

The authors stress the importance of planning for internal security missions prior to the beginning of major combat operations; there must be a plan in place to establish and maintain the rule of law prior to the firing of the first shot. They also suggest having a network in place prior to the start of a conflict; the authors speak of the establishment of the Department of State's Office of the Coordinator for Reconstruction and the United Kingdom's Post-Conflict Reconstruction Unit as steps in the right direction in this area. The third suggestion is that this network be mobilized early; plans should be in place, and the nodes of the network, including finance, personnel, and equipment, should be almost immediately deployable.

The rule of law situation in Afghanistan has a long history; the authors discuss the fact that "Afghanistan has historically lacked a central government" (Jones, Wilson, Rathmell, & Riley, 2005, p. 67), and as such, "Afghan governments have never successfully established a monopoly of the legitimate use of force over the country" and "Afghan governments have never established a formal justice system in the country" (p. 68). Under Taliban rule, the judicial system was informal and based in sharia law; "judges had no legal education (secular or sharia); there were few legal texts available; and corruption was rampant" (p. 72).

Jones and his co-authors directly address Afghanistan in Chapter 4; they operate under the assumption that the establishment of the rule of law is essential to the country's survival: "long term stability to a great extent depends on the central government's ability to establish peace and order throughout Afghanistan" (p. 65). At the time of publication, a successful network had not been established in order to promote rule of law initiatives; "One of the major

reasons is the low level of resources: Afghanistan continues to be one of the lowest staffed and funded U.S., U.N., or European nation-building operations since World War II" (p. 65).

The text is an accessible supplement to the applicable military doctrine and national security strategy. The work is dated; though many of the findings and recommendations are still applicable, the text itself is eleven years old.

The authors draw on their extensive personal experience as military officers working in stability operations. They also cite the National Security Strategy, Army Doctrine, and a number of reports compiled by the Departments of Defense and State. The author, a military officer with previous commands of Civil Affairs units and deputy command of a task force in Afghanistan, writes of the importance of establishing and maintaining the rule of law as part of counterinsurgency operations. In Hussey's own words, "Lawfulness is the foundation of stability" (Hussey & Dotson, 2013, p. 30). Establishing the rule of law by supporting the judicial systems of the host nation reinforces the trust of the citizenry in the government, thereby granting it legitimacy. Hussey and Dotson support the idea that the United States military should not be involved in counterinsurgency operations unless they are willing to commit a large number of troops and a lot of time to the effort; the authors specifically cite a Rand study that states that successful counterinsurgency operations require a ratio of one Soldier to every forty citizens (2013, p. 31). During operations in Iraq and Afghanistan, the ratio was never that close. During the current contingency operations, citizens of the host nations were never confident in the fledgling governments established after major combat operations had concluded; the authors describe the relationship between this insecurity and the rise of the insurgent elements (p. 32). There is a direct correspondence between the weak justice sector and the philosophies of Clausewitz and Galula, where war is discussed as politics by other means and where an

insurgency is competing with the host nation government for legitimacy. A major issue is that while the new governments of the host nations have been attempting to superimpose a legal system from a macro perspective, from the top down, on the citizenry, the Taliban and other insurgent organizations make a direct appeal to the people through local, grassroots campaigns (p. 33).

Hussey revisited the topic of Rule of Law in a second article, reinforcing the idea that the United States must continue to plan for Rule of Law operations; writing with Brigadier General Patrick Reinert, Hussey suggests that these efforts should be conducted through networks of military forces, international organizations, and nongovernmental organizations (The Military's Role in Rule of Law Development, 2015, p. 121). The authors recognize the complexity of engaging in rule of law operations, acknowledging that they should be performed by networks of "embassy teams, international organizations, and NGOs" (Reinert & Hussey, p. 121). They also acknowledge that the concept of rule of law is different between cultures; a court system in the Middle East will not be based on the same type of law as a Western Court (p. 121).

Methods

The methods for maintaining a productive rule of law program are dependent on constant assessment and reassessment of progress; however, the results of these assessments will be fluid. As will be demonstrated below, it is often difficult to establish metrics by which to measure the success of rule of law initiatives. Within the community in Afghanistan these rule of law projects served, assessments were conducted by personnel from the Department of State, by military attorneys, and by the local national attorneys within the employ of the Office of the Staff Judge Advocate. These assessments were conducted among the general populace, among members of the justice sector, among the key leaders of the communities, and among the

attorneys working for the Office of the Staff Judge Advocate. This capstone paper presents a

qualitative assessment, combining the experience of the author with after action reviews

conducted by other rule of law practitioners. These after action reviews are compiled in two

publications that are discussed at length below, *Forged in the Fire* and *Tip of the Spear*; copies

of the original after action reviews are also available on the website of the Center for Law and

Military Operations through The Judge Advocate General's Legal Center and School. After the

demobilization of a deployed unit, the unit judge advocates write about their experience in order

to provide a frame of reference to their colleagues in the field who will follow them. These

reports discuss rule of law experiences, the use of the Commander's Emergency Response

Program to fund initiatives, the employment of Afghan Attorney Advisors, and interaction with

the various agencies that support rule of law programs. These after action reviews are discussed

at rule of law conferences and presented as part of pre-mobilization training at the brigade judge

advocate mission primer course. Some judge advocates may move on to become contributing

editors to such source material as the *Rule of Law Handbook*; others may move on to senior

editor positions or contribute their work to peer reviewed professional journals like *Military*

Review or *Parameters.* There is an ongoing cycle of research, assessment, presentation of

proposed initiatives, conduct of initiatives, review, reassessment, and presentation of findings,

which will eventually be reviewed by colleagues in their pre-mobilization research.

<div align="center">Findings</div>

The justification for any department or agency of the United States government to engage

in rule of law initiatives can be found in the key strategic documents, from the National Security

Strategy, to the Quadrennial Defense Review, to the Defense Strategic Guidance. These policy

documents set clear goals for the departments and agencies; upon publication, they later inform

doctrine for the branches of the military. The United States' commitment to the rule of law is

mentioned a number of times in the 2010 National Security Strategy; in discussing Afghanistan,

the President expressed America's commitment to "the rule of law and due process" in bringing

al-Qaida and affiliated terrorist organizations to justice (Obama, 2010, p. 21); in "at risk" states,

the US would "defend against external threats, and promote regional security and respect for

human rights and the rule of law" (p. 26). On this note, rule of law is discussed as a key to

America's status as a world leader; "The rule of law – and our capacity to enforce it – advances

our national security and strengthens our leadership" (p. 37). The 2010 Quadrennial Defense

Review affirms and supports the National Security Strategy, stating the commitment to rule of

law; "America's efforts to build the capacity of our partners will always be defined by support

for healthy civil-military relations, respect for human dignity and the rule of law, promotion of

international humanitarian law, and the professionalization of partner military forces" (Gates,

2010, p. 50). Gates goes on to illustrate some the goals of military operations in the Central

Command theater of operations; "U.S, Forces have been training, advising, and assisting Afghan

and Iraqi security forces so that they can more effectively uphold the rule of law and control and

defend their territories against violent non-state actors" (Quadrennial Defense Review, p. 27).

Of note, Gates alludes to not only the expedience but to the necessity of networking in

conducting such operations; "Many of our authorities and structures assume a neat divide

between defense, diplomacy, and development that simply does not exist" (p. 74). During the

current overseas contingency operations, military and diplomatic personnel have been working

closely together; in some cases, the military has assumed the diplomatic role. This policy was

turned into doctrine in Field Manual 3-07, Stability Operations, where the rule of law is defined

as "all persons, institutions, and entities – public and private, including the state itself – are

accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and consistent with international human rights principles". The foreword to the *Counterinsurgency* Field Manual, FM 3-24, stresses the military commitment to these initiatives.

> Soldiers and Marines are expected to be nation builders as well as warriors. They must be prepared to help reestablish institutions and local security forces and assist in rebuilding infrastructure and basic services. They must be able to facilitate establishing local governance and the rule of law.

Historically, the United States military has relied upon the attorneys of the Judge Advocate General's Corps in order to engage in rule of law initiatives; this is no different today. For Judge Advocates, this role began in the aftermath of the Spanish-American War, continued after World War II, and carried through to the conflicts in Iraq and Afghanistan (Rule of Law Handbook: A Practitioner's Guide for Judge Advocates, pp. 155-165). *The Rule of Law Handbook* contains a brief history of Judge Advocate RoL initiatives; in recent operations, "rule of law projects became increasingly important after stability operations were underway and an insurgency had emerged in both Iraq and Afghanistan" (Bowman & Child, p. 160). The motivation behind these initiatives tied directly into the counterinsurgency warfare fought by the armed forces; "Consequently, JAs understood that RoL projects demonstrating that the central government followed the law and was fair and just in its dealings with all citizens would promote loyalty to the central government" (p. 160).

The rule of law initiatives enacted by the military in Iraq and Afghanistan are discussed in the *Forged in the Fire* and *Tip of the Spear* texts and in the *Rule of Law Handbook*. The first text immediately addresses the issue of networking during rule of law initiatives, and stresses the importance of consulting the *Rule of Law Handbook* and other agencies and nongovernmental organizations. One of the earliest suggestions is that the rule of law practitioner should

> Identify early all of the agencies involved in RoL projects and establish liaison between the command, local officials, and these entities; aggressively pursue the development of an interagency working group to synchronize efforts and resources even if it is ad hoc in nature. (Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2008, p. 127)

Another early suggestion comes almost directly out of Galula's *Counterinsurgency: Theory and Practice*; judge advocates and rule of law practitioners must "understand the role RoL activities play in strengthening the host nation government's ability to quell insurgency" (p. 128). Further, the importance of networking and networked leadership is immediately reinforced; practitioners must "develop a network of contacts, forming personal relationships with key players in the local legal community and identifying their key centers of gravity" (p. 128). Although networking is recognized as important, it is also recognized that operating as a node in a network is unfamiliar to the military rule of law practitioner; "The linkages necessary to establish such a coordinated response are not fully developed and JAs involved in RoL initiatives will need to aggressively identify and make contact with counterparts in other agencies" (p. 129). This need to coordinate extends beyond interagency relationships; a network must be established between intergovernmental organizations and nongovernmental organizations; "close interaction with other U.S. Government agencies and non-governmental organizations can be fruitful in assisting local attorneys to develop programs targeted for their communities" (p. 133).

Tip of the Spear incorporates more recent after action reports from late in Operation Iraqi Freedom and from the beginning of the Afghan surge. These highlight the importance of establishing some type of metrics for program evaluation.

> There was an issue in determining effective Rule of Law metrics. The building of courthouses, prosecutor's offices, and other hard structures briefs well but does little to demonstrate the advancement or deterioration of RoL in a particular area. (Tip of the Spear: After Action Reports from August 2009-August 2010 - 2010 Supplement to Forged in the Fire, 2010, p. 193)

The importance of internal evaluation is outlined in another after action review; "It is imperative at times to conduct an internal assessment of processes and procedures in order to identify any existing actions that are fueling corruption among host-nation counterparts" (p. 203). The issue of government corruption detracts from the legitimacy of the Government of the Islamic Republic of Afghanistan, thereby lending credibility to the shadow courts organized by the Taliban; one practitioner writes "If the government is not able to develop a legitimate and effective justice system, the insurgents will seek to develop a *de facto* system of justice" (Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2008, p. 131). The topic of metrics and evaluation is further discussed below.

Conversely, some practitioners made the argument that metrics must be taken with a grain of salt; "Metrics in rule of law are subjective, yet the system expects practitioners to provide some assessment of progress"; the recommendation that follows this observation stresses the importance of maintaining flexible standards of success: "Be realistic when working with RoL metrics. Do not pretend that they are more than a subjective assessment" (p. 190). Jones and his co-authors found it difficult to conduct assessments, as "In the justice sector, we found no quantitative data on such indicators as the recidivism rate or the average number of days a prisoner was in detention before an adjudication hearing" (Jones, Wilson, Rathmell, & Riley, 2005, p. 92). Another practitioner highlighted the importance of intangible improvements versus tangible progress; "The building of courthouses, prosecutors' offices, and other hard structures briefs well but does little to demonstrate the advancement or deterioration of RoL in a particular area" (p. 193). This very issue is discussed at length below by Kleinfeld, who recognizes the problem of treating the symptoms of a dysfunctional justice sector without treating the underlying illness.

Tip of the Spear addresses some of the difficulty in utilizing all of the nodes in an interagency network in an environment like Afghanistan; "Because the operating environment was generally non-permissive, the civilian counterparts could not operate on an equal footing" (p. 203). Despite this, the practitioners still stress the importance of coordination between agencies; "The need for RoL development is so great that there is plenty of work to go around for everyone. Networking is important" (p. 191).

Both *Forged in the Fire* and *Tip of the Spear* highlight the importance of utilizing host-nation attorneys in order to support rule of law initiatives. Local national attorneys, also referred to as Afghan attorney advisors, are "excellent resources for Jas and provide a wealth of insight into Afghan culture and legal system" (Tip of the Spear: After Action Reports from August 2009-August 2010 - 2010 Supplement to Forged in the Fire, p. 180). These attorney advisors are an outstanding resource for facilitating networking between U.S. agencies, the host nation, and other nodes in the network; "The Afghan attorney-advisors facilitated key leader engagements (KLEs) and seminars and provided expert advice on governance" (p. 186). The attorney who made this observation, a judge advocate who attended a Brigade Judge Advocate seminar in May of 2010, directly supported the thesis of the capstone in his recommendations.

> Instead of using more U.S. Army JAs and Department of State (DoS) attorneys to do RoL in a host nation, consider using a local national attorney-advisor. They are much more competent in local laws and practices, they can interface directly with local nationals, and the usually can double as a translator to help all sides reach consensus. (p. 186)

Another practitioner made a similar observation, making the distinction between RoL initiatives and tort claims: "Although their primary mission was RoL, they were available to assist in other areas as well, most notably helping out in claims and real property leases" (p. 187). Tort claims against the occupying power or the legitimate government could be perceived to be a part of

establishing the rule of law; it is essential for the citizenry to know that there is an efficient system in place for the swift redress of grievances.

The Commander's Emergency Response Program has been briefly mentioned above, but has not been given the attention it deserves; it has been described as "Possibly the most significant fiscal law development during full spectrum operations in Iraq, and later Afghanistan" (Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2008, p. 221). Early on, the program was authorized to fund "the purchase of goods and services to support a list of projects to address the humanitarian needs of the Iraqi people, including… rule of law" (p. 223). After its successful implementation in Iraq, the program expanded; "Recognizing the CERP as a valuable tool for mission accomplishment, the appropriation also authorized creation of a CERP to benefit the people of Afghanistan" (p. 224). In after action reviews, judge advocates suggested the importance of conducting legal reviews on all proposed Commander's Emergency Response Program projects "to look for the sustainability of the project. Additionally, JAs should ensure the unit submitting the project has done coordination with other relief agencies to ensure they are not working on a similar project" (Tip of the Spear: After Action Reports from August 2009-August 2010 - 2010 Supplement to Forged in the Fire, p. 398). Networked leadership is clearly suggested above. Rule of law initiatives in particular are addressed because they are subject to different approval standards; "large RoL projects must go to the theater commander for approval. The added bureaucracy, and the resulting time lag, is undesirable since governance is one of the main lines of effort in Afghanistan" (p. 400). Where horizontal networking can facilitate the flow of information and resources, the feedback above indicates the judge advocate's frustration with the vertical bureaucracy typical of military hierarchies.

As mentioned above, CERP funds can also be used for condolence payments. These types of payments can be made to make amends for damages or death incurred due to military action, and can be paid at the commander's discretion (Operational Law Handbook, 2015, p. 301). These payments do not require the degree of investigation as the processing of a formal claim; they are to be used to "immediately and publicly express" regret, thereby showing the citizenry that they have access to a quick and efficient redress of grievances.

Adam Bushey, the Rule of Law officer for the 86th Infantry Brigade Combat Team (Mountain) during their 2010 deployment, is the author of two contributions to the *Rule of Law Handbook*. Bushey, who at the time of the deployment was also a full-time desk officer at the United States Agency for International Development, embraced the concept of putting an Afghan face on rule of law initiatives; "I believe the only way to effectively implement a COIN strategy is to employ and receive guidance from the best and brightest locals within the area in which we work" (Bowman & Child, 2015, p. 137). Bushey goes on to describe the formation of the team with which he worked, which he refers to as "Teeme Mushawereen-e Hoqoqi" or the "Legal Advisor Team"; "these local experts had invaluable insight into the local area, people, and customs" (p. 137). Bushey sent the members of his team out to the different districts around the province in order to conduct the assessments and continuing legal education programs discussed below; the team, in turn, expanded the leadership network; "empowering legal staff gave the mission credibility amongst the Afghan leaders, thereby strengthening our partnerships and improving implementation" (p. 137). Assessments were conducted as direct interviews and surveys with members of the justice sector; further a certain degree of document analysis was involved, as part of the program was directed toward understanding of individual rights under the Constitution of the Government of the Islamic Republic of Afghanistan. These samples were

reviewed and compiled into needs assessments; different samples of the population identified

different need within the justice sector. There was some degree of variability to the reliability

and validity of the data as it was collected and presented, as the local national attorneys

employed by the Office of the Staff Judge Advocate spoke and wrote in English as their second

language; the primary language of these attorneys was Dari. Further, answers to the surveys and

interview questions varied by the position and affiliation of the person being interviewed; a judge

appointed to a formal seat could be expected to have different opinions on the needs of the

justice sector from their contemporary in the traditional sharia courts.

     After the assessments were conducted and compiled, the rule of law attorney, under the

supervision of the brigade judge advocate, began to address the issues raised with short-term

projects. In his civilian capacity, the rule of law attorney served as a desk officer for

Afghanistan and Pakistan at the United States Agency for International Development; the

projects; his previous research and experience influenced the projects he proposed, which ranged

from multimedia voting campaigns, to the publication of comic books aimed at Afghanistan's

illiterate population which explained individual rights under the Constitution of the Government

of the Islamic Republic of Afghanistan, to the purchase of a fleet of vehicles enabling

investigators and prosecutors to travel to remote crime scenes. These proposed projects were to

be funded through the Commander's Emergency Response Program; the projects were designed

to have a direct impact on the perception of legitimacy of the host nation government and on the

establishment of the rule of law and development of democracy in Afghanistan. The rule of law

attorney produced letters of justification for the projects, which presented alternative courses of

actions and consequences if the projects were not funded, and statements of work, which

described what contracted publishers and broadcasters would – and would not – perform after the

contract was formally approved. The rule of law attorney would also storyboard the project for

the purposes of military briefing. After review by the Brigade Judge Advocate, proposed

projects were discussed by a board of officers to decide whether their impact was worth the

investment of time and money. Once approved by the board, the projects were either forwarded

to the brigade commander for approval and funded or presented to a higher-level authority, based

on the amount of money required. In a note between the author and the military rule of law

attorney, Bushey offered a summary of the projects he initiated while deployed.

> Unlike many other brigades, all of our programs were Afghan led and Afghan
> owned. The vehicles were asked for by the Afghans. We had Sabir (one of the
> local national attorneys working with the brigade) get an MOU (memorandum of
> understanding) signed by the AG (attorney general) of Afghanistan about their
> commitment to provide fuel and repairs. We even required in the MOU that a log
> book would be required on the trucks use to mitigate personal use. Everything we
> did was approved by the Brigade Commander and the CERP committee.

The project to which the rule of law attorney refers involved the purchase of a fleet of vehicles

for Afghan prosecutors; these vehicles were intended to enable them to move quickly to crime

scenes to collect evidence, interview witnesses, and liaise with police forces. The efforts of

Bushey and his team were groundbreaking, as his predecessors lacked the relationship he

cultivated with local national attorneys; "Many other Judge Advocates lacked even this

relationship with the government because they did not have the Afghan attorney advisors to keep

it maintained." He highlights the importance of keeping a local national face on rule of law

initiatives; "We were doing things that no one else was doing… We did it the right way, but

partnering with the Afghan government. That is the most important aspect of any program".

A problem with the program resulted, not from the number or types of projects, but from

complications due to a dysfunctional network. The military rule of law attorney had a civilian

counterpart, a contract attorney who was unfamiliar with the organization, with Department of

Defense staff, and with the resources available to her. Bushey created an Afghan-Department of

Defense network, instead of one that incorporated US civilian staff; Bushey focused on rule of

law actors who had been ignored by previous ROL programs.

> The vast majority of civilian ROL staff were concentrated in the Key Terrain
> Districts (KTDs), about ten percent of the country. ROL assistance in the
> remaining 90% of the districts, including where the 86th IBCT was operating, had
> to come from DOD if it was to come at all.

Though focused intently on what Kleinfeld would refer to as first generation rule of law reform

programs, he further directed his team's work towards second generation programs targeted at

underlying distrust of the Government of the Islamic Republic of Afghanistan. These efforts

were conducted while the Department of State sought to administer repeated assessments.

Bushey strongly advocates a networked style of leadership when conducting rule of law

operations; "By working with Afghan civic society organizations and Afghan government

leadership, our legal advisors offered Afghans meaningful access to fair, efficient, and

transparent justice" (p. 139). The military rule of law attorney was successful in networking

with representatives from the host nation government and with his Afghan civilian employees.

The Afghan attorneys liaised between the rule of law attorney, local bar associations, Kabul

University, and the local state and traditional courts and judges. In a note between the author

and CPT Bushey, dated 17 June 2016, the military rule of law attorney summarized some of the

second generation rule of law reform projects he and the Afghan network accomplished.

> We were the first brigade to work with the High Office of Oversight (HOO) that
> was dealing with corruption. We were the first brigade to do the district leader
> trainings to teach them about women's rights and how to report corruption to the
> HOO. We were the first brigade to PARTNER with IDLO and paid them to
> complete a 3 week training for the Huquq, who were dealing with civil law cases.

Bushey cites the short rotation schedule as a major problem he faced while assigned in

Afghanistan; "even with strong relationships with the Afghan government, the military is still on

one-year rotations; a stronger foundation could have been built had there been more long-term

ROL partners, civilians, and networks that were deployed and operating battle space areas outside the KTDs".

As the United States military is reluctant and ill equipped, under-manned, and ill trained to engage in successful counterinsurgency operations, the United States Army is ill equipped to conduct operations directed at establishing the rule of law in other countries. However, the civilian leadership of the United States has seemed determined in past and current conflicts to use the Army to overlay western style justice sectors onto host-nation governments. This first-generation perspective on rule of law must give way to second-generation thinking; if the Army is to conduct rule of law initiatives, underlying conditions that make the rule of law impossible must be addressed.

The personnel of the Army's Judge Advocate General's corps are not trained to operate as leaders of networks; beyond their legal training, judge advocates are trained as military officers, leaders of hierarchical fighting units or bureaucracies. More often than not, the military continues to operate as a hierarchical organization; the leadership is not horizontal. There is tension and territoriality between the different agencies that makes it difficult for them to work together. The judge advocates assigned the rule of law mission must be trained to work as partners with their counterparts at the United States Agency for International Development, the Department of Justice, and the Department of State. Further, international partners have not carried an appropriate share of the burden in rule of law initiatives; our allies and coalition partners must begin to make proportional contributions of time and personnel, and must be prepared to function as nodes on the network.

The focus of rule of law efforts has been on tangible and quantifiable projects, as opposed to a focus on the quality of the program. In her own book, Kleinfeld makes an observation that

has come up a number of times while conducting research for this paper: rule of law practitioners often repeatedly make the same mistakes; "rule of law practitioners and scholars keep waking up to the same predicaments, noting them in the same working papers, and then going back to do the same things" (Kleinfeld, 2012). However, the author states that this tendency to repeat the same efforts is fading, referring to this period as a "first-generation" rule of law movement; her book attempts to focus on what she refers to as the "second-generation" rule of law reform (Kleinfeld, 2012). Networked leadership between nations, international organizations, nongovernmental organizations, and other parties is part of this second-generation; "many of the broad ways of thinking about rule of law challenges and strategies apply equally to a range of countries, aid agencies, and international bodies engaged in rule of law promotion" (Kleinfeld, 2012). Afghanistan is a prime example of the type of country targeted for rule of law reform.

> In most countries where the United States and others are working to improve the rule of law, governments are too weak to monopolize violence or are unable to create mechanisms of control for their police and judiciaries. (Kleinfeld, 2012)

Kleinfeld illustrates some of what she considers to be first-generation rule of law initiatives; the "style" of initiative favored "institutional focus largely determined by the legal profession, as represented by a nation's jurists, top legal officials, and attorneys, and by foreign consultants donor personnel" (Kleinfeld, 2012). One can see this type of style in the types of projects taken up, namely "constructing and repairing courthouses," "purchasing furniture, computers, and other equipment," "training judges, lawyers, and other legal personnel," "supporting judicial and other training/management institutes," and "building up bar associations" (Kleinfeld, 2012). The United States and its network have been conducting first-generation rule of law initiatives of exactly this kind since the initial invasion of Afghanistan in 2001. Kleinfeld here invokes an anthropological perspective; these initiatives treat the symptoms without treating the illness, and

"many rule-of-law problems are located primarily not in these legal bodies, but in the broader relationships between the state and society" (Kleinfeld, 2012). The problem is rooted in the loose concept of the nation within the society; the populace must become invested citizens of the nation. An essential question centers on the meaning of citizenship; a citizen has certain fundamental characteristics; "key elements are: membership of a community; rights; duties; equality of status and an ideal" (Lister, 2010, p. 214). This definition centers on the ideas in which a citizen can become invested; for example, Lister describes the concept of community at a lower level than that of the nation; "A multi-tiered analysis also identifies citizenship communities below the level of the nation state in regions, cities, and neighborhoods" (Lister, 2010, p. 217). Apart from the community "as a geographic locality," Lister also observes that there is the community based "on common identity or shared interests" (Lister, 2010, p. 219). The people of Afghanistan tend to self-identify by district or province, by family and ethnic background, and by religion, but not with the Government of the Islamic Republic of Afghanistan. Certain types of Western thought are foreign concepts; Lister discusses the idea of civic republicanism, "where citizenship represented a civic duty to participate in the political life of the community. Duties toward the wider community are prioritized over the rights of individuals" (Lister, 2010, p. 223). The idea of civic duty to the village or district is common, but not to the nation. Conversely, Lister discusses the idea of the liberal political tradition, "which prioritizes the individual over the community. As a consequence, in the liberal tradition, rights represent the essence of citizenship" (Lister, 2010, p. 223). This, too, would seem foreign to an Afghan, who might have seen the withdrawal of the Soviet occupation and its replacement by the Taliban; individual rights would have first been repressed by communist dictatorship, then by theocratic fervor.

Jones and his co-authors come to the conclusion that the international community did not respond quickly enough after the fall of the Taliban; "In Afghanistan, significant levels of resources were not provided during the golden hour, the period immediately following the overthrow of the Taliban regime" (p. 105). An additional conclusion is that future operations be conducted with attention to the immediate "period following major combat operations" (p. 105). Priority must be given to the justice system as well, as a lack of a functioning justice system contributes to the sense of lawlessness following major combat; "while it may be necessary to focus on reconstructing the police and security forces during the golden hour, substantial resources should be quickly devoted to the justice system" (Jones, Wilson, Rathmell, & Riley, 2005, p. 106). Another failure of the network created by the international community came from poor performance of partner nations; "In theory, each lead nation was supposed to contribute significant financial assistance, coordinate external assistance, and oversee reconstruction efforts in its sector" (p. 107). This allocation of nodes on the network did not work as planned, as the partners did not maintain their commitments.

Recommendations

One of the main issues with any counterinsurgency operation is the perception of impropriety. Where the United States, its allies, and the international community might engage in rule of law initiatives with the best of intentions, an insurgent force need only portray the security assistance force as an occupier to inspire adversaries to violence. Care must be taken to maintain the legitimacy of the host-nation government, and to keep a local national face on operations. If the citizens of the host nation do not perceive the government as legitimate, they will not invest in it and will turn instead to the alternative, namely, the sharia courts offered by the insurgency.

Even when leadership roles in rule of law initiatives are properly networked between allies, members of the international community, intergovernmental organizations, and nongovernmental organizations, the risk of misperception is extremely high. Just as there is a fine line between counterinsurgency operations and what could be perceived as expeditionary neocolonialism, there is a fine line between assisting a government with justice sector reform and what is referred to as "capture" of the host nation's government. Kleinfeld writes that "Rule-of-law reforms are often seen by locals not as attempts to develop their countries but as thinly veiled efforts for the United States and Europe to protect their companies while opening foreign markets" (Kleinfeld, 2012). Capture can be exemplified through a discussion of organizations like the International Monetary Fund and the World Trade Organization; these organizations may loan money to a country in need, but in return, they demand governance reforms. Of these initiatives, Kleinfeld writes that the World Bank and International Monetary Fund "saw regulatory bodies, non-corrupt civil services, and functioning legal systems as essential elements that enabled trade and the private market to function in favor of development" (Kleinfeld, 2012). These initiatives were most successful "in countries that had what came to be known as "good governance" – low corruption, functioning civil services and legal institutions, and non-onerous regulation" (Kleinfeld, 2012). There was a trade-off of financial investment for westernization of the economy and legal system. There is not so much difference between this activity and that of networks implementing rule of law initiatives; the networks might offer necessary resources, but without an understanding of the culture of the country they are trying to assist, the resulting justice sector may not be a correct fit.

There are further issues that can arise, even in a properly linked leadership network. In any network, there is always the chance that one node will speak loudly and with more frequency

than the other nodes; in rule of law initiatives in Afghanistan, the loudest and most frequently

heard voice has been that of the United States. This issue is addressed by both Gilchrist and

Keast, and may have disastrous consequences.

> Accountability is often messy in networks, not easily corresponding to
> conventional ideas of due process and democracy. The qualification for inclusion
> in a network is enthusiasm and a willingness to work with others, but this can
> develop to a point where the people who are the most enthusiastic and most
> connected… can dominate. (Glichrist, p. 56)

Within the American agencies conducting rule of law initiatives, the loudest and most frequently

heard voice is that of the military.

The networked approach to leadership allows the nodes to work together to accomplish

the mission; with regard to rule of law initiatives, the network can advise and assist without

superimposing unwelcome or unfamiliar issues of governance; "Networks allow innovative

government officials to discharge government's important role in solving social problems by

supporting – not supplanting –functioning elements of civil society" (Goldsmith & Eggers, p.

37).

The issue of getting the nodes of the network to work together can be a problem.

> Achieving goal congruence in the public sector is not so simple. Alignment of
> goals should mean congruence on outcomes, not processes. Government
> networks, however, tend to form to deliver the type of services whose outcomes
> are sometimes unclear, are difficult to measure, and may take years to realize.
> (Governing by network: The new shape of the public sector, p. 40)

This passage can be perceived as relating directly to rule of law initiatives, where the fruit of the

network's labor has been described by practitioners as hard to confine to metrics, and which by

their very nature are long-term goals. There is also the problem of goal incongruence due to the

interests of the individual nodes of the network; this type "can result from the inevitable tensions

of network members attempting to maximize their own interests, while government pushes its

partners to sublimate their interests to the public good" (Goldsmith & Eggers, p. 42).

Rule of law initiatives involve multiple partners from multiple sectors; Goldsmith and

Eggers briefly describe a typical relationship; "Networked government typically involves

coordination between multiple levels of government, nonprofit organizations, and for-profit

companies" (p. 45). A typical initiative could involve partners from the Departments of State

and Defense, local Afghan bar associations and universities, and contracted Afghan attorney

advisors and security personnel, even in a project as simple as providing local judges with

locking bookshelves in order to maintain copies of jurisprudence. The authors are aware of the

complexity of running an initiative via a network versus the simplicity of implementing a

hierarchical bureaucracy; each node "has its own constituencies, and when complexity is high

and responsibility unclear, coordination problems can undermine the network," resulting in poor

overall performance. Kleinfeld gives an example of how this could affect a network

implementing a rule of law program; "those who work in the rule-of-law field in order to pursue

human rights tend to focus on enacting human rights laws and supporting human rights NGOs.

The biggest problem that Goldsmith and Eggers perceive with networked leadership is with

accountability; "When authority and responsibility are parceled out across the network, who is to

blame when something goes wrong?" (Goldsmith & Eggers, p. 121). This issue has presented

itself in rule of law initiatives in Afghanistan; the conflict between the Department of State and

the Department of Defense attorneys and advisors has been addressed above. The relationship

between stakeholders in rule of law initiatives is often not clearly defined, and the authors point

to clear definitions of roles as the solution to this problem; "Key to unraveling the accountability

conundrum is understanding the hierarchy of responsibility" (p. 122). It is also important that all

stakeholders are focused on the same outcomes and that the goals of the individual stakeholders become secondary to the overall mission; "alignment requires clear, ambitious, and outcome-based performance targets that support the overall strategy of the network" (p. 125). The stakeholders must also trust one another; "Without trust, network participants are unwilling to share knowledge, hindering coordination between them" (p. 128).

Conclusion

The purpose of this capstone paper has been to examine the rule of law initiatives implemented since the inception of current overseas contingency operations in Afghanistan; further, the author sought to explicate the flaws of the programs and to offer possible solutions available through networked leadership between the United States Government and various other organizations, ranging from intergovernmental organizations, through nongovernmental organizations, to private companies and contractors. Such networked leadership, based on successful examples of community and economic development, can remove the financial burden from the American taxpayer and allow the United States to lead an effective coalition, rather than operating unilaterally, and therefore, in an inefficient manner. During the "Global War on Terror," the United States armed forces demonstrated immediate success in combat operations, but were slow to recognize the rise of multiple insurgent elements and to engage in appropriate counterinsurgency and stability operations. Stability was not established in the period immediately following the initial invasions of Iraq and Afghanistan; as such, the populace lost faith in the legitimacy of the host nation government. The goal of these operations has been to establish the legitimacy of the fledgling host nation governments. A major part of counterinsurgency operations is establishing the rule of law; military judge advocates and their staffs have been concerned with and engaged in the establishment of the rule of law since the

beginning of the current conflict. A major tool available to these legal professionals has been the Commander's Emergency Response Program, which provides funding for projects aimed at providing for humanitarian needs. However, a number of factors prevent rule of law programs from being effective; initiatives funded through the Commander's Emergency Response Program tend to be focused on eliminating the symptoms of problems, rather than the corruption inherent in the host nation governments. As seen above, Kleinfeld has observed a tendency of such initiatives to appear to treat the symptoms of the disease without treating the disease itself; such superficial efforts as providing new courthouses and equipment do not lead the Afghan people to place any more trust in the court system in place under the Government of the Islamic Republic of Afghanistan. Further, Nachbar argues that until the populace invests trust in the new government, further problems will continue to arise. During the later stages of the conflict, the United States Government, its NATO allies, and sponsor nations of the United Nations, as well as interested intergovernmental and nongovernmental organizations, have begun to recognize that the suggestions made above can result in more successful rule of law initiatives. Networked efforts between key partners and the host nation government have begun to focus more on addressing the lack of faith the populace places in their government and its judicial sector. However, as the United States has begun to draw down its forces; with the conclusion of Operations Iraqi and Enduring freedom and their subsequent rebirth as Operations New Dawn, Inherent Resolve, and Resolute Support, the effort may be too little, too late.

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